NO. 97-7597

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

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PATRICK KNOWLES,

Petitioner

vs.

STATE OF IOWA,

Respondent.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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# RESISTANCE TO MOTION TO DISMISS WRIT OF CERTIORARI

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## STATEMENT OF FACTS

On March 9, 1996, Patrick Knowles was pulled over for speeding by a Newton, Iowa, police officer. (App. pp. 12-13). Marijuana and a pipe were discovered upon search of his automobile. (App. pp. 15-18).

Knowles was arrested and charged with possession of marijuana and keeping marijuana in a motor vehicle, both violations of the Iowa criminal laws. Iowa Code §§ 124.401(3) and 124.402(1)(e). In addition, he was charged with possession of the pipe under a Newton city drug paraphernalia ordinance. (Motion to Dismiss, Add. pp. 3-4).

Although the State of Iowa was the plaintiff in the prosecutions of the three criminal offenses, the possession of drug paraphernalia charge was made in a separate criminal action. (Hereinafter *Knowles I* refers to the drug paraphernalia prosecution and *Knowles II* is the two marijuana offenses.)

Iowa Rule of Criminal Procedure 6(1) authorizes the State to prosecute two or more offenses as separate counts in a single complaint or trial information if the crimes arose from the "same transaction or occurrence." Under Iowa procedure, a defendant has no right to move to consolidate similar charges at the trial level.

*Knowles I* and *Knowles II* proceeded independently with two separate suppression hearings and two separate trials. Upon convictions on all charges, Patrick Knowles appealed both cases.

With *Knowles I* and *Knowles II* pending before the Iowa Supreme Court, counsel for Patrick Knowles filed an application to consolidate the appeals. The application recited that the "appeals involved the exact same facts and issues" and that the interest of "judicial efficiency" would be served by addressing the issues once as opposed to twice. (Respondent's Motion to Dismiss, Add. pp. 1-2). The State of Iowa, represented by the Attorney General, resisted the consolidation motion, informing the Iowa Supreme Court that "[b]ecause there were two separate trials, necessarily involving two seperate [sic], if similar, records, consolidation of the cases on appeal would not promote judicial economy. Rather, it would lead to confusion as to the facts and issues." (*Id.*, Add. pp. 2-3).

The Iowa court denied consolidation and proceeded to hear and decide *Knowles I* and *Knowles II* in separate appeals. On September 17, 1997, a five judge division of the court affirmed *Knowles I*. (*Id.*, Add. pp. 3-6). A little over a month later on October 22nd, the Iowa Supreme Court, sitting en banc, rendered a 5-4 decision upholding the convictions in *Knowles II*. (App. pp. 30-34). Patrick Knowles petitioned this Court for a writ of certiorari on *Knowles II* only.[1]

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[1]Counsel felt that *Knowles I* was not as appropriate a candidate for certiorari as *Knowles II* because the suppression hearing in *Knowles I* was not court reported per customary procedure in simple misdemeanor cases in Iowa. The entire evidentiary record on the search issue was the judge's almost illegible handwritten notes. In addition, Patrick Knowles had already served his five-day sentence imposed in *Knowles I* so his potential relief was limited.



At no time during one and a half years that *Knowles I* and *II* were pending before the Iowa courts did the State of Iowa attempt to consolidate the cases or raise the defense of collateral estoppel. In addition, the Iowa Attorney General, having represented the State of Iowa on the appeals in *Knowles I* and *Knowles II*, did not raise the matter of issue preclusion in its opposition to Knowles's petition for writ of certiorari.

The defense of collateral estoppel is now raised for the first time by the Attorney General by way of motion to dismiss the writ of certiorari.

## SUMMARY OF RESISTANCE

At every stage in the proceedings in the Iowa courts, the State insisted that *Knowles I* and *Knowles II* be litigated in separate actions. The State of Iowa filed the cases separately at the trial court level and successfully resisted Patrick Knowles's motion to consolidate his appeals before the Iowa Supreme Court.

At no time did the State raise the defenses of collateral estoppel before the Iowa courts. In addition, the State did not bring the matter to this Court's attention in its brief in opposition to Knowles's petition for a writ of certiorari.

The doctrine of collateral estoppel serves the purposes of establishing finality to litigation and conserving judicial resources. The State had every opportunity to conserve the time and efforts of the courts and parties involved in *Knowles I* and *II*, but chose instead to insist that the matters be tried and appealed twice. The State of Iowa waived, and, in fact, invited the alleged error.

Finally, the Iowa Supreme Court's decision in *Knowles I* could not have controlled *Knowles II* because the former was heard by a five judge division of the court and the latter was decided en banc. Thus, the search issue decided in *Knowles I* could not have been, nor was it intended to be, binding on the entire Iowa Supreme Court in *Knowles II*.

The State chose to have Patrick Knowles's criminal offenses decided in two litigations and the Iowa Supreme Court agreed. This Court should not dismiss the writ based on a doctrine designed to facilitate judicial economy when the State of Iowa and the Iowa Supreme Court, with full knowledge of the repetitive nature of the cases, nevertheless elected to hear and decide *Knowles I* and *II* separately. Full faith and credit must be given to the Iowa court's treatment of the appeals.

If *Knowles I* is a final judgment, that decision controls only Patrick Knowles's conviction for possession of drug paraphernalia. It should not bind this Court in deciding *Knowles II* because the State of Iowa and the Iowa Supreme Court knowingly treated *Knowles I* as a separate and non-preclusive decision.



## ARGUMENT

### I. THE FULL FAITH AND CREDIT CLAUSE AND STATUTE REQUIRE THIS COURT TO GIVE THE JUDGMENT IN *KNOWLES I* THE SAME NONPRECLUSIVE EFFECT THAT THE IOWA SUPREME COURT ACCORDED IT IN *KNOWLES II*.

A collateral estoppel defense raised in the federal courts alleging the preclusive effect of a state court judgment must be resolved by the principles embodied in the Full Faith and Credit Clause and statute. *Durfee v. Duke*, 375 U.S. 106, 109 (1963).

The Full Faith and Credit Clause, article IV, section 1, of the United States Constitution, and its enacting statute, 28 U.S.C. section 1738, require the federal courts to accord a state court judgment the same preclusive effect it is entitled to in the courts of the rendering state. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). In deciding this issue, the federal courts are to apply the law of the state in which the judgment is taken. *Kremer v. Chemical Construction Corp.*, 465 U.S. 461, 481-82 (1982).

This Court summarized the source and operation of the principle: "[w]e have a parallel system of state and federal courts, and the concerns of comity reflected in § 1738 generally allow states to determine the preclusive scope of their own courts' judgments." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 385 (1985).

Here, the manner and sequence in which the Iowa Supreme Court decided *Knowles I* and *Knowles II* plainly shows that *Knowles I* did not have, and was not intended to have, a preclusive effect.

First, and most obviously, the Iowa Supreme Court decided *Knowles II* five weeks after *Knowles I* and did not mention the earlier decision let alone assign it a preclusive effect. Four justices of the Iowa court participated in both decisions so the court certainly knew and intended to decide the common search issue twice.

Second, the Iowa Supreme Court assigned *Knowles I*, a simple misdemeanor appeal, to a five judge division of the court, whereas *Knowles II* was heard by the Court *en banc*. One of the justices hearing *Knowles I* was a senior judge sitting by designation who did not participate in *Knowles II*. Thus, the four justices voting to affirm *Knowles I* could not have controlled the disposition of the *en banc* decision issued just weeks later.

Lastly, while both *Knowles I* and *II* were pending on appeal, the Iowa Supreme Court handed down *State v. Doran*, 563 N.W.2d (Iowa 1997), in which the court held for the first time that the search incident to citation statute was valid under the Fourth Amendment. By supplemental briefing submitted in *Knowles I* and *Knowles II*, the defendant asked the Iowa court to reconsider *Doran*. The court's response once again showed that *Knowles I* was assigned the backseat in relation to *Knowles II*.

The five judge division in *Knowles I* refused to revisit *Doran*: "Defendant urges us to reconsider our *Doran* holding, but we decline the invitation." (Motion to Dismiss,



Add. p. 5). In sharp contrast, five weeks later the entire Iowa Court agreed to reconsider *Doran* in *Knowles II* and held in a 5-4 decision: "[w]e are satisfied that our decision in Doran properly identified the public policy reasons that support . . . [the search].." (App. p. 33).

The Iowa Supreme Court clearly treated *Knowles I* as a summary disposition based on recent controlling precedent in *Doran*. On the other hand, *Knowles II* involved the entire court deciding the search issues anew. As further proof of the summary treatment of *Knowles I*, Justice Ternus joined the per curiam decision affirming *Knowles I*, although she had dissented in *Doran* and would again dissent in *Knowles II*. (Motion to Dismiss, Add. p. 4 and App. p. 34).

When the Iowa Attorney General requested *Knowles I* and *II* to be decided separately, the Iowa Supreme Court agreed but quite sensibly assigned the misdemeanor appeal in *Knowles I* for summary disposition under *Doran* and heard *Knowles II* as a full blown reconsideration of the search issue before the entire court.[2]

Under these circumstances, the Iowa Supreme Court was not bound, and did not intend to be bound, by its decision in *Knowles I*. The Full Faith and Credit Clause forbids attaching preclusive effect to *Knowles I* when the Iowa Supreme Court declined to do so.

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[2]The Iowa Supreme Court's treatment of *Knowles I* and *II* is consistent with an exception to the general rule of issue preclusion recognized by the Restatement (Second) of Judgments § 28(3): Relitigation of the issue is not precluded where "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two [litigations]."

*Marrese*, 470 U.S. at 384 (stating federal courts cannot give greater preclusive effect to judgment than rendering state would).

**II. THE STATE OF IOWA HAS WAIVED ITS RIGHT TO ASSERT ISSUE PRECLUSION BY FAILURE TO RAISE THE DEFENSE IN A TIMELY MANNER AND BY CAUSING *KNOWLES I* AND *II* TO PROCEED THROUGH THE IOWA COURTS AS SEPARATE ACTIONS AND APPEALS.**

The doctrine of collateral estoppel promotes judicial economy by prohibiting the endless relitigation of an issue once it has been finally decided by a court of competent jurisdiction. *Montana v. United States*, 440 U.S. 147, 153-54 (1979). It is not a jurisdictional matter, but draws its authority from the power of courts to imbue litigation with finality and certainty and to conserve judicial time and resources.

Here, the State of Iowa elected to file two separate criminal proceedings against Patrick Knowles despite the fact that there was a single act of criminal possession of contraband. Knowles had no authority to control the course and manner of the litigations.

On appeal of these judgments, it was defendant Knowles who quite reasonably requested that the Iowa Supreme Court conserve resources and consolidate these appeals which raised legal issues regarding a single search carried out by the city police. Once again, the State of Iowa insisted that the actions proceed separately and in fact arguably misled the Iowa Supreme Court by alleging in its resistance to consolidation:

> Because there were two separate trials, necessarily involving two seperate [sic], if similar records, consolidation of the cases on appeal would not promote judicial economy. Rather, it would lead to confusion as to the facts and issues. (Motion to Dismiss, Add. pp. 2-3).



The Iowa Supreme Court, unfamiliar with the case at this preliminary stage of the appeal, undoubtedly relied on this representation to deny consolidation.

The Attorney General of Iowa, as legal counsel for the state, requested that the appeals proceed separately and fully participated in both appeals. After *Knowles I* was decided, the Attorney General did not move for summary disposition of *Knowles II* on grounds of collateral estoppel. In fact, given the state's resistance to consolidation, the claim would have required an embarrassing argument.

Iowa law requires that collateral estoppel be timely pleaded as a defense or it is waived. *Swisher & Cohrt v. Yardarm, Inc.*, 236 N.W.2d 297, 298-99 (Iowa 1975); *Bickford v. American Interinsurance Exchange*, 224 N.W.2d 450, 453-54 (Iowa 1974). The State thus waived the issue by not promptly urging the defense after the Iowa Supreme Court's decision in Knowles I.[3] *Aetna Casualty & Surety Co. v. General Dynamics Corp.*, 968 F.2d 707, 711 (8th Cir. 1992) (stating collateral estoppel must be raised at first reasonable opportunity after rendering of decision having preclusive effect); *Lujan v. United States Dept. of the Interior*, 673 F.2d 1165, 1168 (10th Cir. 1982)

[3]The Attorney General's argument that it had no reason or opportunity to raise preclusion during the five-week period between the decisions in *Knowles I* and *Knowles II* would be more convincing had the issue been promptly raised at the next available opportunity which would be the brief in opposition to the petition for certiorari.

(supplemental brief appropriate method to raise collateral estoppel arising from judgment rendered during pendency of appeal).

Once again, when provided an opportunity to resist Knowles's petition for writ of certiorari, the Attorney General failed to raise issue preclusion. This omission should also be treated as a waiver under Supreme Court Rule 15(2) and (4). This rule formalized the practice of this Court announced in *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985): "Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived. Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it."

The state waived this issue at every stage of these proceedings. In fact the concept of waiver does not adequately characterize the state's active participation in assuring that the search issue was decided twice: the State of Iowa insisted on it.

Now the state is asking this Court to invoke a doctrine whose purpose is to conserve judicial time and resources on grounds of a duplicitous legal proceeding that it asked for and Knowles resisted.



The state has already caused the courts and parties to proceed in Iowa through two separate trials and appeals. There are no judicial resources to conserve at this point. The doctrine of collateral estoppel and its avowed purpose of judicial economy are not advanced by allowing the offending party to evoke it, especially when it's too late to benefit the courts or litigants.

The state is engaging in eleventh hour gamesmanship by attempting to rely on a hyper-technical and unjust application of issue preclusion. The result of granting the state's motion to dismiss would be a denial of complete procedural justice to Patrick Knowles and an unearned, and in fact undeserved, windfall for the Attorney General of Iowa.

## III. THE DISMISSAL OF CERTIORARI PROCEEDINGS IN *RICCI v. VILLAGE OF ARLINGTON HEIGHTS* DOES NOT DETRACT FROM OR NARROW THE ISSUE PRESENTED HERE.

In *Ricci v. Village of Arlington Heights*, this Court granted certiorari on the issue of whether the Fourth Amendment prohibits the arrest of a person for a violation of an ordinance that carries only a fine as punishment. The Court later dismissed the writ as improvidently granted.

The State of Iowa implies in the Motion to Dismiss that the dismissal of the writ in *Ricci* narrows the issue presented in this case. (Motion to Dismiss, p. 6). The State also asserts that the Knowles case does not involve the same issue as *Ricci*, and, therefore, Knowles "is not an appropriate vehicle for resolving the question presented."

There is no question that this case is not a proper vehicle for deciding the issue in *Ricci*. They are two separate cases involving two separate constitutional questions.

The dismissal of the writ in *Ricci,* has no impact on disposition in this case because Knowles has not raised this issue, and, further, he was not arrested for a minor offense. Knowles was placed in custody for marijuana charges, not for speeding. *Ricci*, therefore, does not affect the question presented in this case.

## CONCLUSION

After causing the defendant, his counsel, and the courts of Iowa to endure two suppression hearings, two trials and two separate Iowa Supreme Court appeals, and after Patrick Knowles and amici curiae have expended countless hours preparing and filing four briefs before this Court, the Iowa Attorney General for the first time is raising the defense of collateral estoppel, a doctrine whose primary purpose is to conserve judicial resources. The irony is thick.

This Court should promptly deny the State's motion to dismiss on the basis of the Full Faith and Credit owing the Iowa Court's treatment of *Knowles I* and *II* and also on grounds of waiver.

When a party repeatedly fails to raise a defense when required by Iowa law and Supreme Court rules, a finding of waiver is appropriate. When the party instigates the repetitious litigation, reliance on a doctrine whose purpose is judicial economy should be strictly foreclosed.



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**PROOF OF SERVICE**

On the 13th day of July, 1998, I, the undersigned, did serve Petitioner's Resistance to Motion to Dismiss Writ of Certiorari on all parties to this appeal by mailing one (1) copy thereof to the following counsel:

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**CERTIFICATE OF FILING**

On the 13th day of July, 1998, I the undersigned, did file Petitioner's Resistance to Motion to Dismiss Writ of Certiorari with the Clerk of the Supreme Court of the United States by timely mailing, by First Class U.S. mail, pursuant to Supreme Court Rule 12(2) twelve (12) copy to said Clerk at One First Street, N.E., Washington D.C. 20543.

Paul Rosenberg